UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

ANR Pipeline Company — Docket No. GT01-25-001

ORDER ON REHEARING

(Issued November 21, 2001)

ANR Pipeline Company (ANR) filed a request for rehearing of, and Wisconsin Distributor Group (WDG) filed comments on, the Commission's June 27, 2001 letter order issued[1] in this proceeding. That order accepted a service agreement (Agreement) between ANR and Allerton Gas Company (Allerton), subject to ANR demonstrating that the service could not be provided under a generally applicable rate schedule developed consistent with other aspects of its tariff. Alternatively, the Commission required ANR to file a revised Agreement without the non-conforming provisions. In addition, the Commission directed ANR to explain why Allerton is not currently eligible for a regulatory right of first refusal (ROFR) under its current tariff. As discussed below, the Commission denies rehearing. This decision is in the public interest because it clarifies our regulations and policies regarding non-conforming contracts so that parties are clear about contracting practices that we find unacceptable because they present a significant potential for undue discrimination among shippers and those that we find acceptable because they can be permitted without substantial risk of undue discrimination.

Background

On May 30, 2001, ANR filed revised tariff sheets[2] and a service agreement between ANR and Allerton under Rate Schedule FTS-1. The Agreement contained a provision permitting Allerton to "have the right to adjust the MDQ (maximum daily

[1]ANR Pipeline Co., 95 FERC ¶ 61,436 (2000).

[2]Tenth Revised Sheet No. 2, Fourth Revised Sheet No. 190, and Original Sheet No. 191 to FERC Gas Tariff, Second Revised Volume No. 1.

quantity) effective each May based upon available capacity." The Agreement also provided that Allerton would have a right of first refusal under Section 22 of the General Terms and Conditions (GT&C) of ANR's tariff, "notwithstanding the fact that Allerton would otherwise have been ineligible for this right under Section 22.2." ANR requested the Commission to find that these provisions did not constitute material deviations from ANR's Form of Service Agreement and that the Agreement with Allerton need not be filed under Section 154.112(b) of the Commission regulations. However, if the Commission found the Agreement to contain a material deviation from ANR's Form of Service Agreement, ANR requested that the Commission approve the Agreement and accept tariff sheets that referenced the Agreement as a non-conforming agreement. ANR also requested the Commission to grant all waivers of its regulations to allow the Agreement and the proposed tariff sheets to become effective June 1, 2001.

The Commission accepted and suspended the subject tariff sheets and the Agreement, effective June 1, 2001, subject to certain conditions. While ANR's Form of Service Agreement contains a blank to fill in the MDQ, there was no provision in ANR's Form of Service Agreement, the applicable rate schedule, or the GT&C that would allow a shipper to annually adjust the MDQ (either up or down) during the term of an agreement. We determined that what ANR had proposed changed the service provided under its Rate Schedule FTS-1 but only as it would apply to Allerton. We therefore directed ANR, within 20 days of the issuance of the letter order, to demonstrate that the service could not be provided under a generally applicable rate schedule developed consistent with other aspects of its tariff or to file a revised agreement without the non-conforming MDQ provision. Thus, the Commission accepted the filing, conditioned upon ANR satisfying one of these two alternatives.[3]

As to the right of first refusal issue, it appeared ANR's currently effective tariff Section 22.2 provides for all of ANR's firm shippers with an initial term of one year (including Allerton) to be eligible for the ROFR. Moreover, the Commission reviewed the transactional data reported on ANR's web site which indicated that the Allerton contract in question is a maximum rate contract making it eligible for a "regulatory" ROFR under Order No. 637. We therefore required ANR to explain why it believes Allerton was not automatically eligible for this regulatory right under ANR's tariff.

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[3]The Commission extended the time until September 17, 2001.

Request for Rehearing

ANR seeks clarification about the type of demonstration it must make to show that the right to adjust the MDQ cannot be provided under a generally applicable rate schedule. ANR explains that Allerton is a small LDC and intends to use this transportation contract exclusively to serve a food products plant in its service territory. Allerton requested the right to adjust its MDQ primarily to address the possibility that the plant may shut down. Because Allerton has a small load (775 Dth), ANR could accommodate its request for flexibility, without any significant adverse impact on ANR and its other shippers.[4] ANR asserts it was accommodating a captive customer's request for flexibility, consistent with Commission policy, but that it cannot give all its customers the same flexibility to reduce their contract demand for any reason, particularly those with much larger contract demands, since that could have a major impact on ANR and potentially result in large costs shifts for other shippers. ANR notes that it has negotiated more narrowly drawn rights to reduce contract demand with other customers who have larger contract demands. ANR asserts that allowing it to tailor contract demand adjustment provisions to the specific needs and circumstances of individual shippers as part of the consideration for the agreed-upon rate promotes the Commission's policy of providing the market with more flexibility without harming other shippers. ANR asks the Commission to clarify that the above explanation clarifies why ANR cannot provide this type of contract demand adjustment provision under a generally applicable rate schedule.

If the Commission fails to accept and adopt the above clarification, ANR seeks rehearing of the June 27 letter order. ANR contends that the MDQ adjustment provision in the Agreement is a permitted, mutually agreeable, non-material deviation from its Form of Service Agreement. ANR argues that the Commission should either determine that the provision need not be filed because it is not a material deviation, or accept the provision as part of a non-conforming agreement, without requiring its incorporation in the tariff as a generally applicable service.

ANR contends the Commission's policy allows modifications and additions to a Form of Service Agreement to be mutually negotiated and requires material deviations to a Form of Service Agreement to be filed, but provisions addressing maximum delivery obligations would not ordinarily be considered to be material. ANR asserts that the

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[4]ANR states that, to the extent that Allerton seeks to increase its MDQ, the provisions make such requests subject to available capacity. Even without this contractual provision, ANR asserts that Allerton would have the same right to request additional capacity and ANR would be required to grant such a request provided capacity was available and Allerton agreed to continue to pay ANR's maximum tariff rate.

Commission has accepted service agreements with mutually negotiated rights to adjust a shipper's MDQ.[5] ANR argues that the Commission should have accepted the parties' Agreement to include the MDQ adjustment provision as an individually negotiated agreement that is allowed under existing Commission policy. ANR contends the provision is not the product of the exercise of market power by it, but is a provision that benefits the shipper without harming ANR or other shippers and that the granting of this right is not unduly discriminatory or preferential.

While conceding that the provision is a negotiated provision which deviates from its Form of Service Agreement, ANR argues that the issue is whether the deviation is material. ANR believes that the language in Order No. 582 quoted by the Commission in the June 27 letter order indicates that negotiated provisions addressing maximum delivery obligations would not normally be expected to be material. The relevant language from Order No. 582 is as follows:

> The Commission also agrees that provisions such as those addressing flow rates, pressure obligations, maximum delivery obligations, receipt and delivery points, and term would not normally be expected to be "material" deviations.

ANR concludes that the MDQ adjustment provision at issue here should be treated as a provision "addressing . . . maximum delivery obligations" within the meaning of Order No. 582, and thus should be considered a non-material deviation, that need not be filed with the Commission.

ANR asserts that the June 27 letter order is inconsistent with Commission policy, which allows parties to mutually negotiate MDQ adjustment provisions, because the Commission, in effect, is treating the MDQ provision as a prohibited negotiated term and condition of service. ANR argues the Commission erroneously concluded that the proposed provision was a material deviation from ANR's Form of Service Agreement, which represents a change in Commission policy redefining the concepts of negotiated rates and negotiated terms and conditions and blurs the distinction between non-conforming contractual provisions. ANR believes that the letter order constitutes a new policy which effectively precludes the negotiation of any non-rate term regardless of whether the deviations are material, or whether the provisions relate to the operation of the pipeline system. ANR asserts that, if the Commission intended to change its policy, the

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[5]<u>See</u> ANR Rehearing Request at 5-7 (describing the Commission's policy on this issue and citing to Kern River Gas Transmission Co., 94 FERC ¶ 61,161 (2001)).

Commission must clearly articulate its reasons for doing so and apply any changes prospectively.

Finally, with regard to the ROFR provision in the Agreement with Allerton, ANR states that its current tariff continues to provide a ROFR to all firm shippers with contract terms of a year or more. However, ANR points out that it has filed pro forma tariff language in its Order No. 637 compliance filing that would limit the ROFR to maximum rate shippers, unless ANR and the shipper agree otherwise. ANR states that it does agree with the Commission that if Allerton's contract is accepted as a non-conforming recourse rate agreement, Allerton would be eligible for ROFR under Section 22.2 of ANR's GT&C as revised pursuant to Order No. 637, because it is a maximum rate contract. However, ANR argues that, if the Commission accepts the Agreement as a negotiated rate agreement, Allerton would <u>not</u> be eligible for this regulatory right because negotiated rate agreements entered into after the March 26, 2000 effective date of Order No. 637 are not eligible for ROFR.[6] Therefore, ANR states, if the Commission decides that the MDQ adjustment is a non-material deviation or accepts the Agreement as non-conforming, the ROFR provision is unnecessary. However, if the Commission grants ANR's request and accepts the Agreement as a negotiated rate agreement, ANR requests the Commission to find that the contractual ROFR is not a material deviation.

In its comments, WDG emphasizes the importance to shippers of being able to contract with confidence for the type of provision at issue in this proceeding. WDG asserts that the Commission's letter order appears to preclude shippers from negotiating with ANR for contract flexibility as to MDQ reductions. WDG asserts that, if this is the intent, it is unclear what benefits negotiated rate authority provides that were not available under the Commission's discounted rate policy. WDG states that the type of provision at issue is meaningful to shippers as they make various contracting decisions. Thus, WDG is concerned that the Commission is providing a market-constricting signal that shippers who negotiate favorable contract provisions with a pipeline risk having those contracts overturned by the Commission.[7] WDG argues that, in the face of long-standing efforts to mitigate pipeline market power and develop more even-handed

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[6]ANR Rehearing Request at 19 (citing Order No. 637-A, FERC Stats. & Regs. [Reg. Preambles] ¶ 31,099 at 31,634-35 (2000); <u>see</u> <u>also</u> Fifth Revised Sheet No. 162 of the ANR's GT&C, FERC Gas Tariff filed in Docket No. RP00-3232-000 (July 10, 2001)).

[7]WDG views the types of contract provisions filed by ANR as progress towards shippers and pipelines developing mutually beneficial commercial relationships that allow for business flexibility for both the shippers and the pipeline.

commercial relationships,

no policy or legal interests are served by disallowing contract provisions sought by and beneficial to shippers when no other shippers are affected.

Discussion

A. MDQ Adjustment Provision

On rehearing, ANR requests the Commission to find that the MDQ adjustment provision in Allerton's service agreement did not constitute a material deviation from its Form of Service Agreement. Alternatively, ANR requests that the Commission approve the service agreement as non-conforming, without requiring that ANR modify its tariff to offer the same MDQ adjustment provision to all its customers.

Below, we deny ANR's request that we find that the MDQ provision is not a material deviation. We therefore hold that ANR was required to file the service agreement with the Commission, thus giving both the Commission and other parties an opportunity to review the agreement and consider whether it is unduly discriminatory. In addition, based on our review of the agreement, we find the proposed MDQ adjustment provision unacceptable because it presents a significant potential for undue discrimination among shippers.

1. What constitutes a material deviation

ANR concedes that neither its tariff nor its Form of Service Agreement contain any provision that would allow a shipper to adjust its MDQ during the term of an agreement. Therefore, there is no question but that the MDQ adjustment provision constitutes a deviation from the Form of Service Agreement. However, ANR points out that §154.1(d) of the Commission's regulations only requires it to file contracts that deviate "in any material respect from the Form of Service Agreement in the tariff." It contends that, under current Commission policy, as set forth in Order No. 582, adopting § 154.1(d), the MDQ adjustment provision does not constitute a "material deviation" from the Form of Service Agreement. We disagree, and hold that, under current Commission policy, to the extent an MDQ adjustment provision such as is at issue here deviates from the tariff and the Form of Service Agreement, the deviation is material and the Agreement must be filed.

Section 4(c) of the Natural Gas Act (NGA) requires that, under such rules as the Commission may prescribe, pipelines must file not only schedules showing all rates for jurisdictional services, but also must file "all contracts which in any manner affect or relate to such rates, charges, classifications, and services." Order No. 582 adopted Sections 154.1(b) and (d) and 154.110 for the purpose of implementing this requirement. Section 154.1(b) sets forth the general requirement that pipelines must file all contracts related to their services. Section 154.1(d) provides that, for purposes of § 154.1(b), any contract that conforms to the Form of Service Agreement set forth in the pipeline's tariff pursuant to § 154.110 need not be filed. Section 154.110 requires that pipeline tariffs contain an unexecuted pro forma copy of each Form of Service Agreement. The Form of Service Agreement must:

> refer to the service to be rendered and the applicable rate schedule of the tariff; and, provide spaces for insertion of the name of the customer, effective date, expiration date, and term. Spaces may be provided for the insertion of receipt and delivery points, contract quantity and other specifics of each transaction as appropriate.

Section 154.1(d) provides that any contract that "deviates in any material aspect from the Form of Service Agreement in the tariff" must be filed.

Since these regulations implement the filing requirements of section 4 of the NGA, they must be interpreted in a manner that is consistent with the statute. Section 4 requires the filing of all contracts which "in any manner" affect the services the pipeline provides to its customers. Clearly, this filing requirement applies to all customer service agreements, without exception. Thus, the Commission is only able to exempt the pipeline from filing any particular customer's service agreement, based on a finding that the section 4 filing requirement has already been satisfied by the pipeline's previous filing of the pro forma service agreement. Where a customer's service agreement conforms to the pro forma service agreement (and the other provisions of the pipeline's tariff), the Commission's prior review and approval of the pro forma service agreement and the tariff have accomplished the purpose of the section 4 filing requirement. Since the Commission and other interested parties have had an opportunity to determine that the Form of Service Agreement provided for in the tariff is just and reasonable and non-discriminatory, there is no need to review subsequent conforming contracts to determine if they comply with the requirements of the NGA.

However, for this procedure to satisfy the filing requirements of NGA section 4, the customer's service agreement must truly conform to the Form of Service Agreement. There is such conformity, where a service agreement contains only the approved language of the Form of Service Agreement, with the blank spaces described in § 154.110 for filling in such information as the name of customer, term, etc., completed in a manner consistent with the tariff.[8] However, where the service agreement contains a provision not in the approved language of the Form of Service Agreement and that provision (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff and (2) affects the substantive rights of the parties, the Commission cannot be considered to have already reviewed the service agreement when it reviewed the pro forma service agreement. Because it contains a provision affecting the substantive rights of the parties which the Commission has never seen before, and since NGA section 4 requires the filing of all contracts which affect the pipeline's service "in any manner," the statute requires the filing of such a service agreement.

Consistent with the requirements of NGA section 4, the Commission interprets the provision of § 154.1(d), requiring the filing of any contract that "deviates in any material aspect from the Form of Service Agreement," as follows: A material deviation is any provision of a service agreement which goes beyond filling in the spaces in the Form of Service Agreement with the appropriate information[9] provided for in the tariff, and that affects the substantive rights of the parties. Therefore, §154.1 requires the filing of any service agreement which contains a material deviation of this type. Here, ANR has conceded that the MDQ adjustment provision it agreed to include in Allerton's Agreement goes beyond filling in spaces in the Form of Service Agreement in ANR's tariff with information provided for in its tariff. The MDQ adjustment provision also unquestionably affects the substantive rights of ANR and Allerton, since it allows Allerton to adjust its contract demand each May. Therefore, the MDQ adjustment provision is a material deviation that must be filed.

ANR suggests that Order No. 582 allows certain deviations from the Form of Service Agreement which go beyond filling in the spaces or blanks in the Form of Service Agreement to be treated as non-material deviations, including provisions addressing

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[8]The Commission has allowed pipelines to include in their tariff provisions identifying the types of permissible discounts that could be applicable to a shipper's contract, such as a discount based on a shipper's agreement to flow a specified volume. Once permissible conditions for discounts are listed in the tariff, then such a condition may be included in the rate portion of a customer's service agreement, without constituting a material deviation or rendering the service agreement a nonconforming agreement. See Transcontinental Gas Pipe Line Corp., 87 FERC ¶ 61,051 (1999). However, § 284.13(b)(1)(viii) and (2)(vi) require that such conditions applicable to any discounted transportation contract be posted on the pipeline's web site.

[9]Specifically, we mean information that is appropriate when read in context with the surrounding language of the Form of Service Agreement.

maximum delivery obligations. It relies in particular on the following statement in Order No. 582:

> The Commission also agrees that provisions such as those addressing flow rates, pressure obligations, maximum delivery obligations, receipt and delivery points, and term would not normally be expected to be "material" deviations.

ANR argues that "provisions . . . addressing . . . maximum delivery obligations" include MDQ adjustment provisions of the type it agreed to include in Allerton's service agreement. However, the sentence in Order No. 582 relied on by ANR is immediately followed by the explanation that:

> Such provisions could easily be drafted into the fixed language of the pro forma service agreements or a blank space could be provided for insertion according to the agreement of the parties. Likewise, rates that fall between the maximum and minimum rates would not be considered to be material. In either case, there would be no deviation from the Commission approved pro forma service agreements contract[10]

This explanation reflects the Commission's belief that the listed provisions, including those addressing maximum delivery obligations, would not be material deviations, if the Form of Service Agreement is drafted to include provisions concerning such matters with appropriate blanks to be filled in. However, if the pipeline has not drafted its pro forma service agreement to have a blank in which a number can be filled in to address matters such as maximum delivery obligations, then the addition of a footnote or other clause covering such a matter is a material deviation. Any other interpretation of Order No. 582 and §154.1 would violate NGA section 4. Matters such as maximum delivery obligations affect the rights of the customer in whose service agreement such a provision might be contained, and could raise issues as to undue discrimination among customers. Allowing pipelines to include such provisions in the service agreements of customers without any review by the Commission either as part of the pro forma service agreement or the review of an individual service agreement would be contrary to the section 4 requirement that pipelines file contracts affecting service "in any manner."

Our interpretation of §154.1 is consistent with the Commission's clarification, on rehearing of Order No. 582, of what the Commission would consider to be a material

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[10] See also Williston Basin Interstate Company, 84 FERC ¶ 61,348 at 62,519 (1998).

deviation from the Form of Service Agreement. Order No. 582-A provided the following clarification:

> To illustrate, a pro forma service agreement may contain blanks to be filled in, or ranges for terms of service (such as 950-1100 psi). A contract would be consistent with the tariff if, for example, it was completed by filling in the blanks or included terms that fall within the prescribed ranges. There is no need to burden the pipeline with filing contracts that conform to the pro forma agreement that has been filed and approved by the Commission as part of the tariff. Of course, where a contract conflicts with the tariff, the tariff controls until the contract is filed and accepted by the Commission. Thus, any contract which is not consistent with the pro forma service agreement must be filed with the Commission.[11]

This language clearly contemplates that filling in the blanks in a pro forma service agreement or including terms within prescribed ranges does not constitute a material deviation.[12] However, there is no suggestion that an entirely new provision not contemplated by the Form of Service Agreement or the tariff can be added to the Form of Service Agreement without it constituting a material deviation. We accordingly hold that the MDQ adjustment provision at issue here constitutes a material deviation that must be filed with the Commission.

2. Commission review of non-conforming agreements

In the June 27 order, once we found that the MDQ adjustment provision was a material deviation from the tariff and the Form of Service Agreement, we then directed ANR, within 20 days of the issuance of the letter order, to demonstrate that the service could not be provided under a generally applicable rate schedule developed consistent with other aspects of its tariff or to file a revised Agreement without the non-conforming MDQ provision. On rehearing, ANR contends that this effectively treated the MDQ adjustment provision as a negotiated term and condition of service of the type Order No. 637 refused to authorize. However, ANR contends that Order No. 637 defined negotiated

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[11]Order No. 582-A at 31,558.

[12]Where a Form of Service Agreement does have blanks to fill in such matters as minimum pressure obligations so that such obligations can be negotiated as part of the service agreement, the agreed-up minimum pressure obligation or other such term would constitute "special details pertaining to a transportation contract" within the meaning of § 284.13(b)(viii) (2001). Thus, this information must be posted on the pipeline's web site consistent with that regulation.

terms and conditions of service to involve matters related to operational conditions of transportation service on the pipeline. It argues that the level of a customer's MDQ does not relate to operational conditions, and therefore the MDQ adjustment provision at issue here should not be considered a negotiated term and condition of service of the type at issue in Order No. 637. For the reasons discussed below, the Commission denies ANR's request for rehearing.

Once a service agreement has been found to deviate materially from the Form of Service Agreement and the tariff so that it must be filed for Commission review, a further issue arises as to whether the Commission should approve the non-conforming agreement. The Commission finds that material deviations from the Form of Service Agreement fall into two general categories -- those that must be prohibited because they present a significant potential for undue discrimination among shippers and those that can be permitted without substantial risk of undue discrimination.

One category of material deviation that is generally not permitted is negotiated terms and conditions of service. The Commission determined in Order No. 637 not to provide pipelines with the authority to file for pre-approval of the right to negotiate terms and conditions of service with individual customers, because of the risk of undue discrimination among customers. In Order No. 637, the Commission stated that it generally considers negotiated terms and conditions to be related to operational conditions of transportation service.[13] Order No. 637 gave as examples of such conditions, "scheduling, imbalances, or operational obligations such as OFOs."[14] Subsequently, the Commission has held that negotiated terms and conditions of service include any provisions that result in a customer receiving a different quality of service than that provided other customers under the pipeline's tariff[15] or that affect the quality of service received by others. An example would be where a pipeline's tariff requires all customers to maintain uniform hourly flows but the pipeline negotiates a special provision allowing one customer to deviate from the tariff's uniform hourly flow requirements. Consistent with Order No. 637, where a material deviation in a non-conforming contract constitutes a negotiated term and condition of service, the

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[13]By contrast, Order No. 637 stated that negotiated rates, which the Commission does authorize, include non-operational matters such as "the price, the term of service, the receipt and delivery points, and the quantity." Order No. 637, III FERC Stats & Regs. ¶ 31,300 at 31,344.

[14]Id.

[15]See Dominion Transmission, Inc., 93 FERC ¶ 61,177 (2000).

Commission would require that the pipeline modify its tariff to offer the negotiated service to all its customers or explain why it can only provide the service to this one customer.

However, not every material deviation from a pro forma Form of Service Agreement entails such a risk of undue discrimination that it cannot be permitted. For example, the Commission has permitted pipelines to negotiate rates that deviate from those that are set forth in the pipeline's generally applicable rate schedules, so long as the shipper continues to have the option of choosing recourse service from the pipeline.[16] In Order No. 637, the Commission stated that permissible "negotiated rate agreements can include the price, the term of service, the receipt and delivery points, and the quantity."[17] However, as the policy statement on alternatives to traditional ratemaking emphasized, "the predicate for permitting a pipeline to charge a negotiated rate is that capacity is available at the recourse rate."[18] Therefore, as discussed further below, a key factor in determining whether to approve a material deviation agreed to as part of a negotiated rate agreement is the extent to which the option of obtaining service at the recourse rate is an adequate alternative.

In addition, there are other material deviations that may be negotiated with an individual shipper to address its unique characteristics, without affecting the quality of service received by that shipper or others. For example, the Commission recently approved a provision in a service agreement with a limited partnership that exculpated the individual partners from liability for the actions of the partnership.[19] The partnership agreement required this provision in all material contracts it entered into.

Applying the above analysis to the contract between ANR and Allerton, we find that MDQ adjustment provisions of the type at issue here present too much potential for undue discrimination, unless they are offered in the pipeline's tariff pursuant to generally applicable conditions. Allerton's MDQ adjustment provision permits it either to increase or decrease its MDQ each May. A special provision in a shipper's contract allowing it to increase its MDQ without following the regular procedures set forth in a pipeline's tariff

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[16]Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, and Regulation of Negotiated Transportation Services of Natural Gas Pipelines, 61 Fed. Reg. 4633 (February 7, 1996), 74 FERC ¶ 61,076 (1996).

[17]Order No. 637, III FERC Stats & Regs. ¶ 31,300 at 31,344.

[18]74 FERC at 61,241.

[19]ANR Pipeline Co., 97 FERC ¶ 61,075 (2001).

for purchasing capacity could adversely affect others seeking capacity from the pipeline, since the shipper with the special provision would have a priority for obtaining the capacity. Thus, such a special right to increase contract demand is contrary to Commission policy. However, ANR states that the MDQ adjustment provision in Allerton's contract was not intended to give Allerton such a special priority for obtaining additional capacity. Rather, ANR explains, since the provision makes Allerton's right to increase its MDQ subject to available capacity and since Allerton is paying the maximum rate, this provision simply recognizes ANR's obligation as an open-access transporter to make its capacity available to any shipper willing to pay its maximum rate. If this is all that was intended by the inclusion of a right to increase contract demand in the MDQ adjustment provision, then the provision is unnecessary insofar as it permits Allerton to increase its contract demand.

In any event, the primary purpose of the MDQ adjustment provision appears to be to permit Allerton to reduce or terminate its contract demand. We recognize that ANR has stated that it cannot offer all its customers the same broad flexibility to reduce contract demand, not tied to any particular event and without any additional payment to ANR, as included in Allerton's contract. However, ANR's explanation of how it has negotiated more narrowly drawn rights to reduce contract demand with other customers who have larger contract demands only increases our concern about the potential for undue discrimination in the offering of contract adjustment rights. It is clear that ANR has negotiated quite different contract demand reduction rights with different customers. A shipper's right to reduce, or terminate, its contract demand before the expiration of its contract is a valuable right, since it can enable the shipper to avoid significant liability for future reservation charges. Such a valuable right must be granted in a not unduly discriminatory manner.

While a pipeline may place reasonable conditions on the negotiation of contract demand reduction rights,[20] such conditions must not be unduly discriminatory. The Commission finds that requiring pipelines to file generally applicable tariff provisions setting forth the conditions under which they will offer contract demand reduction rights is the best means of assuring that those rights will be negotiated in a not unduly discriminatory manner. Such a tariff filing would give the Commission and other interested parties an opportunity to review the circumstances in which the pipeline will

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[20]For example, it may be reasonable for a pipeline to tie contract demand reduction rights to certain events, such as the closure of the plant being served by a particular contract or, in the case of an LDC, a loss of customers through retail unbundling or a bypass.

offer contract demand reduction rights. Also, once approved, the tariff provision will require the pipeline to grant similar rights to similarly situated customers.

As ANR points out, in two cases involving Tennessee Gas Pipeline Co.,[21] the Commission held that provisions permitting the termination or reduction of service could be negotiated as part of negotiated rate agreements. The Commission treated those provisions as covering the rate and the term of the agreement, matters that it concluded could be negotiated under the Commission's negotiated rate policy. However, the Commission has reconsidered that holding, and, in a contemporaneous order on rehearing in Tennessee, is changing the policy stated in the earlier Tennessee orders.

It is true, as Order No. 637 stated, that negotiated rate agreements can include not only the price, but also the term of service, the receipt and delivery points, and the quantity. Such provisions are necessary to define the service to be received at the negotiated rate. However, it does not follow that the Commission should permit contract demand reduction or termination provisions to be negotiated as part of negotiating the contract term or quantity to be included in a particular service agreement. The linchpin of the Commission's negotiated rate policy is that a customer not satisfied with the negotiated rate offered by the pipeline for the amount of service requested by the shipper can always obtain available capacity at the Commission-determined just and reasonable recourse rate. Where a customer is seeking service for a set contract term and quantity, the recourse service does provide an adequate alternative. If a mutually agreeable rate cannot be agreed upon, the shipper can always obtain the same service at the recourse rate for the same contract term and quantity. However, if the customer desires a special contract demand reduction or early termination right not provided in the generally applicable tariff, the availability of service at the recourse rate does not provide an adequate substitute, since recourse service would not include any such provision. This reinforces our conclusion that pipelines should not be permitted to negotiate such provisions, unless they are offered, subject to reasonable conditions, as part of the pipeline's generally applicable tariff.

Since ANR currently has no tariff provision offering contract demand adjustment provisions on a not unduly discriminatory basis, the Commission rejects the contract demand adjustment provision in the subject contract with Allerton, and requires that it be removed from the contract. If ANR wishes to offer such provisions to its shippers, it may file a tariff provision proposing the non-discriminatory conditions pursuant to which it proposes to offer such provisions.

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[21] 87 FERC ¶ 61,206 (1999), rehearing pending. 89 FERC ¶ 61,033 (1999), rehearing pending.

B. Right of First Refusal

The Agreement with Allerton also provides that Allerton would have a right of first refusal under Section 22 of the General Terms and Conditions (GT&C) of ANR's tariff, "notwithstanding the fact that Allerton would otherwise have been ineligible for this right under Section 22.2." The Commission directed ANR to explain why Allerton is not currently eligible for a regulatory right of first refusal under its current tariff, which continues to provide a ROFR to all firm shippers with contract terms of a year or more. In response, ANR points out that it has filed pro forma tariff language in its Order No. 637 compliance filing that would limit the ROFR to maximum rate shippers, unless ANR and the shipper agree otherwise. However, ANR states that it agrees with the Commission that, if Allerton's contract is accepted as a non-conforming recourse rate agreement, Allerton would be eligible for ROFR under Section 22.2 of ANR's GT&C as revised pursuant to Order No. 637 because it is a maximum rate contract. Since the Commission has accepted Allerton's contract as a non-conforming recourse rate agreement, it is clear that Allerton will have a right of first refusal, regardless of the acceptance of ANR's Order No. 637 filing. Accordingly, the ROFR provision in the service agreement is superfluous and need not be considered further.

The Commission orders:

(A) The request for rehearing is denied.

(B) Within 30 days of the date of this order, ANR must file a revised agreement with Allerton, removing the MDQ adjustment provision consistent with the above discussion.

By the Commission.

(S E A L)

David P. Boergers,
Secretary.